

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: GENERIC PHARMACEUTICALS PRICING ANTITRUST LITIGATION	MDL 2724 16-md-2724
THIS DOCUMENT RELATES TO: <i>The State of Connecticut, et al. v. Teva Pharmaceuticals USA, Inc., et al.</i>	HON. CYNTHIA M. RUFÉ Civil Action No.: 2:19-cv-02407-CMR

**DEFENDANTS' MOTION FOR LEAVE TO FILE A RESPONSE IN FURTHER
SUPPORT OF THEIR NOTICE OF SUPPLEMENTAL AUTHORITY**

If the Court should grant the States' Motion for Leave of Court to File a Proposed Response to Defendants' Notice of Supplemental Authority, Dkt. 244, Defendants respectfully request that Defendants also be granted leave to file a brief in response, attached as Exhibit 1. The States argue in their Proposed Response that the Supreme Court's decision in *AMG Capital Management, LLC v. FTC* is irrelevant to the pending motions to dismiss the States' complaints. 141 S. Ct. 1341 (2021). But the States ignore key aspects of the *AMG Capital* decision and omit the fact that the decision directly impacts numerous cases cited in both parties' briefing on the pending motions to dismiss. Defendants' proposed response addresses these omissions and demonstrates that *AMG Capital's* relevance to the pending motions to dismiss the States' disgorgement claims is beyond dispute.

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EXHIBIT 1

**UNITED STATES DISTRICT COURT
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IN RE: GENERIC PHARMACEUTICALS
PRICING ANTITRUST LITIGATION

MDL 2724
16-md-2724

THIS DOCUMENT RELATES TO:

HON. CYNTHIA M. RUFE

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Civil Action No.: 2:19-cv-02407-CMR

**DEFENDANTS' RESPONSE IN FURTHER SUPPORT OF THEIR
NOTICE OF SUPPLEMENTAL AUTHORITY**

In *AMG Capital Management, LLC v. FTC*, the Supreme Court held that the FTC could not obtain disgorgement under Section 13(b) of the FTC Act, a statutory provision that (1) only provides for injunctive relief, *i.e.*, “relief that is prospective, not retrospective,” and (2) falls within a statute that has separate provisions authorizing backward-looking monetary relief. 141 S. Ct. 1341, 1347–48 (2021). Among other forms of relief not at issue here, the States seek disgorgement under Section 16 of the Clayton Act, 15 U.S.C. § 26, but Section 16 does not authorize disgorgement as a remedy. Section 16, like Section 13(b) of the FTC Act, only provides for injunctive relief “against threatened loss or damage”—meaning future harm—and is part of a statutory scheme with separate provisions permitting recovery of backward-looking monetary relief that the States have elected not to use. *Compare* 15 U.S.C. § 26 *with* 15 U.S.C. § 15. Because of the similarity of the relevant portions of these statutes, cases addressing the FTC’s power to seek disgorgement under Section 13(b) of the FTC Act animated the parties’ briefing on the States’ ability to obtain disgorgement in this case. Indeed, the States bolstered their claims for

disgorgement by relying upon cases now *overturned* by the Supreme Court’s decision in *AMG Capital*. See, e.g., State Opposition to Defendants’ Joint Motion to Dismiss the States’ Federal Law Claims for Lack of Standing, Dkt. 203, *Connecticut et al v. Teva Pharmaceuticals USA, Inc.*, 19-cv-2407-CMR (Jan. 15, 2021) (citing *FTC v. Cephalon, Inc.*, 100 F. Supp. 3d 433, 437-39 (E.D. Pa. 2015); *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 372 (2d Cir. 2011); *FTC v. Com. Planet, Inc.*, 815 F.3d 593, 601 (9th Cir. 2016), abrogated by *AMG Capital v. FTC*, 141 S. Ct. 1341 (2021)).

Despite invoking cases that interpret the FTC Act and Section 13(b) in past briefing, the States now take the position that *AMG Capital* is irrelevant because the case (1) involved the FTC Act, which also includes separate administrative procedures that the Court highlighted in its opinion, and (2) referenced *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946) and *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960)—decisions over 50-years-old that maintained broad views of equity jurisdiction. See Dkt. 244, Ex. 1 at 2. The States’ arguments interpret *AMG Capital* too narrowly and overlook that case’s relevance and direction here.

The States first ignore the Supreme Court’s central holding that a statute permitting a plaintiff to obtain an “injunction” does not give the plaintiff the right to obtain “an award of equitable monetary relief.” *AMG Capital*, 141 S. Ct. at 1347. This interpretation applies to Section 16 of the Clayton Act as forcefully as it does to Section 13(b) of the FTC Act.¹ And the States

¹ Compare Section 13(b) of the FTC Act, 15 U.S.C. § 53(b) (“Whenever the Commission has reason to believe—(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission . . . the Commission . . . may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission’s likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, . . . a preliminary injunction may be granted. . . . Provided further, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction.”) with Section 16 of the Clayton Act, 15 U.S.C. § 26 (plaintiffs may sue for “injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws, . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, . . . a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue”).

ignore that this holding is consistent with the Third Circuit’s recent decision in *FTC v. AbbVie Inc.*, 976 F.3d 327, 376 (3d Cir. 2020), which the parties’ motion to dismiss brief discussed extensively.

Instead, the States cling to *AMG Capital*’s recognition that the Court has at times “interpreted similar language as authorizing judges to order equitable monetary relief.” *AMG Capital*, 141 S. Ct. at 1347 (citing *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946) and *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960)). But as *AMG Capital* itself acknowledges, the statutes at issue in *Porter* and *Mitchell* featured language substantially broader than Section 16 of the Clayton Act or Section 13(b) of the FTC Act. *AMG Capital*, 141 S. Ct. at 1350. Moreover, *AMG Capital* specifically abrogated a Ninth Circuit decision that relied heavily on the same expansive reading of *Porter* and *Mitchell* that the States posit here. *Id.* (abrogating *FTC v. Com. Planet, Inc.*, 815 F.3d 593, 598–599 (9th Cir. 2016), a decision “grounded” on *Porter* that held that “[w]hile § 19(b) precludes a court from awarding damages when proceeding under § 13(b), it does not eliminate the court’s inherent equitable power to order payment of restitution”). That abrogated decision is also one that the States themselves cited with support in their briefing. *See, e.g.*, Dkt. 203, 19-cv-2407-CMR at 3 n.2.

The Court’s analysis in *AMG Capital*—in particular, its discussion of *Porter* and *Mitchell*—illustrates instead how examination of the “text and structure of [a] statutory scheme” may reveal limitations on permissible equitable remedies. *AMG Capital*, 141 S. Ct. at 1343. The Clayton Act’s statutory structure places the States’ requested remedies in a different section than Section 16: monetary compensation for past harm falls under Section 4 of the Clayton Act, which allows “any person who shall be injured to sue” and recover a monetary remedy. 15 U.S.C. § 15. If the unequivocal language—“injunctive relief”—were not sufficient to foreclose the States’ arguments, the statutory structure certainly is. Following the same “interpretative approach” relied

on in *AMG Capital*, where “the relevant statutory scheme (as here) contain[s] other ‘elaborate enforcement provisions,’ including (as here) provisions that explicitly provide for that form of relief [sought],” then a “grant of equitable authority does not authorize” a monetary remedy. *AMG Capital*, 141 S. Ct. at 1350. *AMG Capital*’s relevance here cannot seriously be contested.

Dated: May 28, 2021

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**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: GENERIC PHARMACEUTICALS
PRICING ANTITRUST LITIGATION

MDL 2724
16-md-2724

THIS DOCUMENT RELATES TO:

HON. CYNTHIA M. RUFE

*The State of Connecticut, et al. v.
Teva Pharmaceuticals USA, Inc.,
et al.*

Civil Action No.: 2:19-cv-02407-CMR

**[PROPOSED] ORDER GRANTING DEFENDANTS' LEAVE TO FILE
RESPONSE**

AND NOW, this _____ day of _____, 2021, upon consideration of the Defendants' Motion for Leave to File a Response in Further Support of Their Notice of Supplemental Authority, it is hereby **ORDERED** that Defendants' Motion is **GRANTED**. Defendants are permitted to file the Response, which is attached as Exhibit 1 to their Motion for Leave to File.

IT IS SO ORDERED.

BY THE COURT:

HON. CYNTHIA M. RUFE